IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No.

INGRAM DAY LUMBER COMPANY,
Petitioner,

vs.

SYDNEY C. McLOUTH,
Revived against THE AMERICAN LOAN & TRUST COMPANY, Administrator of the Estate of Sydney C. McLouth, Deceased,
Respondent.

PETITIONER'S SUPPORTING BRIEF.

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Official reports of opinions delivered in court below.

District Court Opinion, 6 Fed. (2d) 471.

Circuit Court of Appeals. Not yet reported.

See Record, pp. 74-79.

STATEMENT OF JURISDICTION OF SUPREME COURT.

(1) This is an action of assumpsit commenced by the Ingram-Day Lumber Company, a Wisconsin corporation, in the District Court of the United States for the Eastern District of Michigan, Southern Division, against Sydney C. McLouth, a citizen and resident of Marine City, Michigan, for the recovery of damages for breach of contract in an amount not exceeding one hundred thousand dollars. (R. 1-4.) Judgment was entered in the District Court June 1, 1925 (R. 39). On writ of error this judgment was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit on June 30, 1926 (R. 73).

(2) It was contended by petitioner in the District Court and in the Court of Appeals (R. 63-65):

(a) That the admission in evidence, both oral and documentary, of McLouth's transactions with the Fleet Corporation, was erroneous.

(b) That the District Court having found as a fact that petitioner had been damaged by McLouth's breach of contract in the amount of $42,789.96, erred in rendering judgment for petitioner for the sum of $647.65.

(c) That the Court erred in permitting McLouth to file an amended plea.

(d) That the Court erred in holding that the cancellation by the Fleet Corporation of its contracts with McLouth, permitted McLouth to in turn cancel his contract with petitioner.

(e) That the Court erred in failing to find as a matter of fact that the United States Government,

or any agency thereof, never modified, suspended, cancelled or requisitioned the contract between petitioner and McLouth.

(f) That the Court erred in holding that the Act of June 15, 1917, applied to this contract.

(3) Certiorari is prayed under Section 240 of the Judicial Code as amended by Act of February 13, 1925.

U. S. Comp. Stat., Cum. Supp. 1925, *Chap.* 10, *Par.* 1217.

It is submitted that this record presents special and important reasons for reviewing the decision of the Circuit Court of Appeals by the writ of certiorari which the petitioner seeks. Whether the Act of June 15, 1917, can be used by one individual to limit his liability under his private contract with another individual, is an important question of federal law which has not been, but should be, settled by this court. The decision whose review is sought seems in conflict with applicable decisions of this court and with underlying ideas of the rights of parties to private contracts. It is in conflict with the decision of the Court of Appeals for the Seventh Circuit in a suit involving the same statute (Am. Chain Co. vs. Interstate, etc., Co., 291 F. 1006; 263 U. S. 709); and, in its disregard of the finding of fact in the court below, as well as by its approval of the amendment of the plea after the case had been argued and submitted, it apparently departed far enough from the usual course of judicial proceedings to call for an exercise of this court's power of supervision.

STATEMENT OF CASE.

Petitioner is a Wisconsin corporation having its principal place of business at Lyman, Mississippi (R. 35).

Nearly three months after the signing of the Armistice, on February 5, 1919, Sydney C. McLouth of Marine City, Michigan, entered into a written contract with petitioner wherein it was agreed that petitioner would sell and McLouth would buy a large quantity of lumber at a certain stipulated price per one thousand feet (R. 5-10).

In August and September of 1918, McLouth had entered into two contracts with the United States Shipping Board Emergency Fleet Corporation (R. 51-52) under the terms of which McLouth was to build certain tugs for the Fleet Corporation.

When entering into his contract with petitioner, McLouth gave petitioner no information whatever about his contracts with the Fleet Corporation (R. 56); but made an absolute, unqualified, private contract to buy certain lumber.

April 29, 1919, the Fleet Corporation partially cancelled its contracts with McLouth (R. 53); and seizing upon this action by the Fleet Corporation as excusing him from further performance, McLouth proceeded to cancel his contract with petitioner (R. 47).

Suit was brought by petitioner against McLouth in the District Court of the United States for the Eastern District of Michigan, to recover its damages caused by McLouth's breach of his contract (R. 1-14).

McLouth appeared by the United States District Attorney and pleaded the general issue (R. 14-15). Subsequently, McLouth died; the cause was revived against his administrator who appeared by the Assistant United States District Attorney and pleaded the general issue (R. 21-22). A jury having been waived (R. 23) trial was had before the court.

Over the objections of petitioner, McLouth was permitted to introduce in evidence his two contracts with the Fleet Corporation and their subsequent cancellation (R. 51-55). At the conclusion of the trial, petitioner submitted to the Court requests for special findings of fact and conclusions of law (R. 57-61).

The District Court found as a fact that at the time petitioner made its contract with McLouth, it did not know that McLouth had a contract with the Fleet Corporation, or that the tugs were being built for the Fleet Corporation. The Court further found that petitioner's total damages amounted to the sum of $42,789.96, of which amount $42,142.31 represented its lost profits (R. 61).

The District Court was of the opinion that petitioner's lack of knowledge of McLouth's contracts with the Fleet Corporation was immaterial (R. 38-39), and, further, that the case of Todd Dry Dock & Construction Corporation vs. Sumner Iron Works, 289 Fed. 217 (certiorari denied 263 U. S. 709), was controlling of the instant case (R. 39), and accordingly entered judgment for petitioner in the sum of $647.65 (R. 39-40).

On writ of error from the United States Circuit Court of Appeals for the Sixth Circuit, that Court affirmed the judgment of the District Court (R. 73).

In its opinion the Circuit Court of Appeals disregarded the findings of fact of the District Court and held that petitioner was a sub-contractor (R. 78). It further held that this case was substantially identical with Todd Dry Dock & Construction Corporation vs. Sumner Iron Works (supra), and was controlled by that case (R. 79).

SPECIFICATION OF ERRORS RELIED ON.

First. Said Circuit Court of Appeals erred in affirming the judgment of the District Court.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the District Court, and in not remanding said cause to said District Court with instructions to enter judgment for petitioner in the sum of $42,789.96.

Third. Said Circuit Court of Appeals erred in affirming the rulings of the District Court permitting the introduction in evidence of McLouth's transactions with the Fleet Corporation.

Fourth. Said Circuit Court of Appeals erred in holding that petitioner was not entitled to judgment for its damages amounting to $42,789.96.

Fifth. Said Circuit Court of Appeals erred in limiting petitioner's recovery to the sum of $647.65.

Sixth. Said Circuit Court of Appeals erred in holding that the Act of June 15, 1917, 40 U. S. Statutes at Large 182, conferred the power to modify the obligations of a private contract.

Seventh. Said Circuit Court of Appeals erred in holding that the Act of June 15, 1917, 40 U. S. Statutes at Large 182, applied to this case.

Eighth. Said Circuit Court of Appeals erred in holding that petitioner was a sub-contractor.

Ninth. Said Circuit Court of Appeals erred in holding that the law permitted no recovery of lost profits.

Tenth. Said Circuit Court of Appeals erred in holding that the cancellation by the Fleet Corporation of its contracts with McLouth conferred upon McLouth the power to cancel his contract with petitioner.

SUMMARY.

It is the contention of petitioner that the Act of June 15, 1917 (40 Stat. 182) has no application to the facts in this case for the following reasons:

First. The contract sued upon was between an individual and a private corporation (R. 5-10).

Second. The contract was entered into nearly three months after the war was over (R. 5).

Third. The contract was an absolute, unqualified and independent contract between petitioner and McLouth under the terms of which petitioner agreed to sell and McLouth to buy a certain quantity of lumber (R. 5-10).

Fourth. No mention is made in the contract about any other contract or contracts that McLouth then had or might afterwards enter into with anyone (R. 5-10).

Fifth. No contingencies were incorporated in

the contract to excuse either party from complete performance thereof (R. 5-10).

Sixth. Petitioner did not even know that McLouth had a contract with the Fleet Corporation or that the tugs were being built for the Fleet Corporation (R. 61).

Seventh. If McLouth desired to predicate his liability upon future action of the Fleet Corporation, it was his duty to so contract with petitioner.

Guerini Stone Co. vs. Carlin, 240 *U. S.* 264.

American Chain Co. vs. Interstate Iron & Steel Co., 291 *Fed.* 1006 (Certiorari denied 263 U. S. 709).

Eighth. Not having so contracted, it was error for the Court to receive evidence of McLouth's transactions with the Fleet Corporation.

Guerini Stone Co. vs. Carlin, 240 *U. S.* 264, 278.

Ninth. It is not to be assumed that Congress intended that the power given by the Act of June 15, 1917, should be exercised by the President arbitrarily or that the President, by his order, intended to vest absolute powers in the Shipping Board and Fleet Corporation, subject only to such regulations as he might from time to time prescribe.

The Lake Monroe, 250 *U. S.* 246.

BRIEF OF ARGUMENT.

I.

The admission in evidence, both oral and documentary, of McLouth's transactions with the Fleet Corporation, was clearly erroneous.

The Court will observe the following with reference to the contract sued upon in this case (R. 5-10).

(a) Entered into February 5, 1919, or nearly three months after the signing of the Armistice;

(b) The only parties to the contract were petitioner and Sydney C. McLouth;

(c) The contract was an absolute, unqualified agreement by petitioner to sell and McLouth to buy;

(d) The parties did not contract with reference to any other contract that McLouth then had or might thereafter enter into.

When the case came on for trial, the only parties to the case were petitioner and McLouth's Administrator, who appeared by the Assistant United States Attorney (R. 21). The only plea filed by defendant was a plea of the general issue (R. 22).

From the foregoing it is obvious that McLouth's contracts with the Fleet Corporation and their subsequent cancellation, were entirely immaterial and were clearly inadmissible in evidence.

Guerini Stone Co. vs. Carlin, 240 *U. S.* 264.

Even if otherwise competent, under a plea of the general issue only, such evidence was inadmissible.

Morse vs. Tillotson & Wolcott Co., 253 *Fed.* 340.

Larsen vs. Field, 219 *Mich.* 440.
Werry vs. Granger, 219 *Mich.* 503.

The case was tried May 8, 1924 (R. 40); August 12, 1924, McLouth moved to file an amended plea (R. 29), to which petitioner objected (R. 61), judgment was entered June 1, 1925 (R. 39), and the same day the court permitted McLouth to file his amended plea (R. 36). The Circuit Court of Appeals, in approving this procedure, says:

> "A court has discretion to permit amendment to pleadings upon such conditions, as it shall, in its discretion *and by its rules prescribe*" (R. 76).

There is no rule of the District Court permitting the procedure followed in this case. The District Judge in his opinion (R. 36) mentions no rule but places it upon the ground of sound judicial discretion.

In Stephen on Pleadings (Tyler), at page 151, the author says:

> "But, whatever may be the origin and reason of the method of coming to issue, it is at least certain that that method has been substantially practiced in the English pleading from the earliest period to which any of the now existing sources of information refer. * * * The term itself, of 'issue,' though perhaps somewhat less ancient, yet occurs as early as the commencement of the Year Books, * * * and from the same period at least, if not an earlier one, the production of the issue has been not only the constant effect, but the professed aim and object of pleading."

In 21 Ruling Case Law, page 436, appears the following:

> "In a more restricted and in the commonly accepted sense the object of pleading is to notify the opposite party of the facts which the pleader expects to prove, and so it is that the allegation of such facts must be made with that certainty which will enable the adverse party to prepare his evidence to meet the alleged facts."

If the practice followed in this case is proper, we are at a loss to understand why any pleadings should be required in any law suit.

II.

The judgment entered in this case has no support in fact or in law.

The evidence offered by petitioner in this case (R. 47-50) conclusively shows that if McLouth had not breached his contract with petitioner, petitioner would have made a profit amounting to $42,789.96. This fact is not contradicted by McLouth, in fact, it is not even questioned, McLouth offering no testimony concerning the damages suffered by petitioner on account of his breach. The District Court filed a special finding of fact that petitioner's total damages amounted to the sum of $42,789.96, of which amount $42,142.31 represented petitioner's lost profits (R. 61). Nevertheless, the District Court held that lost profits were not a proper element of damage and gave judgment for petitioner in the sum of $647.65. The amount of petitioner's damages was arrived at by deducting from the contract price the cost of performance (R. 48-50).

This Court has many times held that the proper

measure of damages is arrived at by deducting from the contract price the cost of performance.

> "No more definite or certain method of estimating the profits could well be adopted, than to deduct from the contract price the probable cost of furnishing the materials and doing the work."
>
> *Guernsey Stone Co. vs. Carlin*, 240 U. S. at page 280.

In United States vs. Purcell Envelope Co., 249 U. S. at page 320, appears the following:

> "The Court of Claims decided that the measure of damages was the difference between the cost to the Envelope Company of materials and the manufacture and delivery of the envelopes and wrappers in accordance with the terms of its contract and what it would have made if it had been allowed to perform the contract. For this the court cited and relied upon Roehm vs. Horst, 178 U. S. 1. It is there decided that the positive refusal to perform a contract is a breach of it, though the time for performance has not arrived, and that liability for the breach at once occurs. And it is further decided that the measure of damages is the difference between the contract price and the cost of performance. The case was replete in its review of prior cases. We may refer, however, to United States vs. Speed, 8 Wall. 77, 85; United States vs. Behan, 110 U. S. 338; Hinckley vs. Pittsburg Steel Co., 121 U. S. 264."

We deem it unnecessary to call the Court's attention

to the numerous other decisions, both State and Federal, which are all to the same effect.

III.

The Act of Congress, June 15, 1917 (40 Stat. 182), cannot be used by one individual to modify the obligations of his private contract with another.

The relevant parts of this Act are set forth in the margin hereof (1).

The following cases, we believe, are all of the reported cases in which this Act, or some portions of it, has been before this Court for construction:

The Lake Monroe, 250 *U. S.* 246.
Hamilton vs. Kentucky Distilleries Co., 251 *U. S.* 146.
United States vs. Strang, 254 *U. S.* 49.
Krichman vs. United States, 256 *U. S.* 363.
United States vs. Pfitsch, 256 *U. S.* 547.
Sloan Shipyards vs. U. S. Fleet Corporation, 258 *U. S.* 549.

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(1) "The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material or take possession, lease or assume control of, any street railroad, interurban railroad, or part thereof, cars and their equipment necessary to operation.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

Omnia Commercial Co. vs. United States, 261 *U. S.* 502.

Russell Motor Car Co. vs. United States, 261 *U. S.* 514.

Emergency Fleet Corporation vs. Sullivan, 261 *U. S.* 146.

Ex parte Skinner & Eddy Corp., 265 *U. S.* 86.

Brooks Scanlon Corp. vs. United States, 265 *U. S.* 106.

College Point Boat Club vs. United States, 267 *U. S.* 12.

An examination of these decisions discloses the following:

(a) In all of these cases the United States, or one of its agencies, was a party;

(b) In all of these cases, in which contracts were involved, the United States, or one of its agencies, was not only a party to the suit, but a party to the contract sued upon;

(c) In all of these cases, in which contracts were involved, the contracts were entered into prior to the signing of the Armistice;

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipment for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition,

(d) In none of these cases has this Court held that this Act conferred the power upon one individual to modify his private contract obligations with another, in fact, quite the contrary;

In Russell Motor Car Company vs. United States (supra) Justice Sutherland, in the course of his opinion, says:

> "The power to modify the obligations of a private contract is, to say the least, a most unusual one for governmental exercise. To modify a contract is in effect to make a new one, and it puts something of a strain on our conception of the functions of government to concede its power to make contracts between private parties to which neither may assent and which, consequently, neither will be bound to perform." (At page 520.)

In denying the Car Company the right to recover its anticipated profits in this case, the Court further says:

> "The contract, we must assume, was entered into with the prospect of its cancellation in view,

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acquire or take over any part or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time." (Fed. Stat. Ann.—1918 Supp. 803-805.)

since the statute was binding and must be read into the contract. The possible loss of profits, therefore, must be regarded as within the contemplation of the parties." (At page 524.)

Bearing in mind the fact that the contract in the Russell case was made May 14, 1918, and directly with the United States, acting through the Secretary of the Navy, there can be no question that this Court's assumption as set forth in the preceding paragraph is a correct one, but how it can be assumed in this case, that petitioner entered into its contract with McLouth, with the prospect of its cancellation in view, where petitioner had no knowledge of McLouth's contracts with the Fleet Corporation, is beyond comprehension.

If the construction placed upon this Act by the Circuit Court of Appeals is correct, it is manifest that by the statute the Government interposes with its power to annul the covenants of a contract between two of its citizens and to transfer contract rights from one and vest them in the other.

IV.

Petitioner's contract was property.

"The contract in question was property within the meaning of the Fifth Amendment, Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685, 690; Cincinnati vs. Louisville & Nashville R. R. Co., 223 U. S. 390, 400, and if taken for public use the government would be liable." *Omnia Commercial Co. vs. United States*, 261 U. S., at page 508.

"These contracts were protected, not only un-

der the constitutional provision referred to, but the right to these prospective profits, any advantage of value under them, was a species of property finding protection under both the Federal and State Constitutions, in the provisions that private property shall not be taken for public use without just compensation."

Danolds vs. State, 89 *New York* 36.

42 *American Reports*, 277, 280.

V.

There is still the question whether Congress has the power to deprive a party to a private contract of his property therein, without just compensation.

"The mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon."

United States vs. Cohen Grocery Co., 255 *U. S.* at page 88.

"The right to damages is property and an Act of Congress providing that an order of the President shall be a defense to an action is unconstitutional, so far as it assumes to defeat such right."

Griffin vs. Wilcox, 21 *Ind.* 370.

"A law which deprives a party of all legal remedy must necessarily be void. * * * And where a statute does not leave a party a substantial remedy, * * * it cannot be regarded as a regulation of the remedy, and is void."

Cooley Constitutional Limitations at page 289.

"But a vested right of action is property in the same sense in which tangible things are

property, and is equally protected against arbitrary interference."

Cooley Constitutional Limitations, at page 362.

No authority conferred by Congress justifies an invasion of private property to an extent amounting to an entire deprivation of its use and enjoyment, without compensation to the owner. (Richards vs. Terminal Co., 233 U. S. 546, 556.) The power of Congress to impair or modify a contract is confined to those instances where Congress, out of considerations of public policy, has been vested with the power to control or regulate the matters to which the contract relates. (Newman vs. Moyers, 47 App. Dec. 102.)

And in Capital Trust Co. vs. Calhoun, 250 U. S. 208, 218, where an Act of Congress limiting the amount of a fee payable out of an appropriation was attacked as divesting a pre-existing right and depriving the attorney of property, it was said:

> "The right to bind by contract and require performance of that contract are examples of that liberty and that protection and they might have resistless force against any interfering or impairing legislation if the contest in the case was simply one between Calhoun and the Arnold estate."
>
> "The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the just compensation it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or in any manner to interfere with the just powers

> and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything can be clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so. * * * The value of property generally speaking, is determined by its productiveness—the profits which its use brings to the owner."
>
> *Monongahela Navigation Co. vs. United States*, 148 *U. S.* 312.

Although the Constitution does not prohibit Congress from passing a law impairing the obligation of a contract, the State of Michigan, where this contract was made, was a part of the Northwest Territory, formerly governed by the Ordinance of 1787. In that Ordinance it is declared:

> "That these articles shall be considered as articles of compact between the original states and the people and states in the said territory, and *forever remain unalterable*, unless of common consent, to wit:
>
> * * * * *
>
> And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed."

This Ordinance has never been repealed and, so far as this provision is concerned, has never been altered by mutual consent, which would require action by Congress and by all the states affected, or at least by the state in which the law impairing the contract is sought

to be made effective. The Ordinance does not limit this prohibition to local legislation, but applies equally to legislation by Congress when it provides that "no law ought ever to be made or *have force* in the said territory."

The Constitution preserves all rights created or acquired under the Confederation, which would include the right of all states carved out of the Northwest Territory, and their citizens, to the protection guaranteed by the Ordinance against any laws, from any source, impairing the obligation of contract.

We submit that the result of the judgment in this case permits McLouth to accomplish indirectly what the Government itself could not do directly.

VI.

The Act of June 15, 1917, does not apply.

To hold that this Act is controlling of the instant case it is necessary to hold that the Act applies:

(a) To an absolute and unconditional contract entered into between an individual and a private corporation;

(b) To a contract in which neither the United States, nor any agency thereof, is a party in any manner;

(c) Which contract is entered into nearly three months after the war is over;

(d) Which contract is never cancelled, requisitioned or modified by the United States nor any agency thereof;

(e) To a suit arising out of the breach of such contract and in which neither the United States nor any agency thereof is a party.

We believe that we have examined every reported decision of the Federal Courts, in which this Act has been construed, and we have been unable to find a single case in which the material facts were similar to the facts in this case, where it has been held that the Act is controlling.

VII.

Todd Drydock & Construction Corporation vs. Sumner Iron Works distinguished.

In concluding its opinion in this case, the Court of Appeals says:

> "The facts of this case are substantially identical with the facts involved in Todd Drydock & Construction Corporation vs. Sumner Iron Works, supra. In that case the Supreme Court denied certiorari. For this reason the decision in that case is especially persuasive." (R. 79.)

We submit that the learned Court of Appeals erred in stating that the facts in the two cases are substantially identical and it obviously erred further in assuming that the denial of certiorari in the Todd case afforded any implication that this Court affirmed that decision.

The Todd case is reported in 289 Fed. 217, certiorari denied, 263 U. S. 700, No. 363, October Term 1923.

We have examined a copy of the record filed in the Supreme Court in the Todd case and by comparing the undisputed facts in the Todd case with the undisputed facts in this case, we have the following result:

First. The first contract in the Todd case was en-

tered into June 5th, 1918, upwards of five months before the signing of the Armistice; the contract in this case was entered into February 5th, 1919, nearly three months after the signing of the Armistice (R. 5).

Second. The orders in the Todd case (from buyer to seller) specifically set forth—Emergency Fleet Corporation—and in accepting these orders the plaintiff (seller) in the Todd case specifically set forth—"It is understood that the deck machinery covered by the above orders, is to be used in connection with the construction of vessels which the Todd Drydock & Construction Corporation have contracted to build and construct for the United States Shipping Board Emergency Fleet Corporation,"—while in this case the contract is absolutely silent about any other contract that McLouth then had or might thereafter enter into with any person, firm or corporation (R. 5-10).

Third. Upon the trial of the Todd case the parties thereto entered into a stipulation as to facts which provided in part as follows:

> "The contract between the parties hereto for the construction by plaintiff of a number of winches was made for the purpose of outfitting the said twenty-four (24) steel steamships with deck machinery. Plaintiff at the time of entering into said contract for the construction of said winches, knew that said winches were to be used as deck machinery for the outfitting of said twenty-four (24) steel steamships *and knew that said twenty-four (24) steel steamships were under construction by the defendant for the United States* (italics ours) represented by said Fleet Corporation."

While in this case after the trial in the lower court, the District Court found as a fact:

> "That at the time plaintiff's contract was entered into with McLouth, the plaintiff knew that the lumber was to be furnished for the building of tugs, but did not know that McLouth had a contract with the Fleet Corporation, or that the tugs were being built for the Fleet Corporation." (R. 61.)

Fourth. In giving its decision in the Todd case, the Circuit Court of Appeals quotes from the decision of this court in Duesenberg Motors Corp. vs. United States, 260 U. S. 115, as follows:

> "It was the abrupt and unexpected suspension of hostilities and the declaration of an armistice that was the cause of loss to the contractor, and the disappointment of profits from its contract which it was preparing to realize and would have realized. But it took that chance and has not now a legal claim against the government for reimbursement of its outlays. * * * There was no prophecy of the Armistice, its sudden happening terminated the further execution of the contractor's undertaking, preventing, as we have said, the realization of profits. And, we repeat, this chance the contractor took, and must abide the result."

In this case, how can it be held that the Armistice affected petitioner's contract right when the contract was not entered into until nearly three months after the signing of the Armistice? How can it be further held that petitioner took a chance upon the happening of the Armistice, or upon any other action of the Government, when petitioner had no information

whatever about any possible interest the Government could have in McLouth's contract with petitioner?

We are not criticising the decision in the Todd case; the facts are so materially different that the case has no application,—much less, can it be considered decisive of the instant case.

The Supreme Court said in United States vs. Carver, 260 U. S. 482, 490:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."

VIII.

Petitioner was not a sub-contractor.

The Circuit Court of Appeals, disregarding the finding of fact by the District Court (R. 61) in its opinion, found that petitioner was a sub-contractor (R. 78).

In 37 Cyc. 340, appears the following definition of a sub-contractor:

> "An under contractor—one who takes under the original contract, and is to perform in accordance with the original contract, and presumably with knowledge of the terms and conditions of the original contract; one who contracts for the principal contractor."

The record in this case conclusively shows that petitioner was not a sub-contractor, but that petitioner's contract was an independent, private, separate and collateral agreement with McLouth.

IX.

Action of Fleet Corporation should not relieve McLouth.

The unfairness of the decision in this case is concretely illustrated from the record itself. In the first telegram of cancellation to McLouth from the Fleet Corporation under date of April 29, 1919, appears the following:

> "Permission is hereby given you subject to our final aproval to solicit and accept domestic work for private account for tonnage substantially equivalent to the tonnage covered by this suspension order." (R. 53-54.)

Bearing in mind the fact, that prior to May 6, 1919 (R. 56), petitioner had no knowledge whatsoever of McLouth's dealings with the Fleet Corporation, the result of the decision in this case places McLouth in the unique and profitable position of himself deciding whether or not he should compel petitioner to furnish to the last foot the lumber called for under the contract, or, whether he should cancel it without liability.

This is directly contrary to the decision of this Court in Guerini Stone Co. vs. Carlin, 240 U. S. 264, where the Court held that although the principal contract between the Government and the contractor gave the Government the right to suspend, as the contractor had not safeguarded himself by incorporating that provision into the sub-contract, he was not relieved from the damages caused the sub-contractor by such suspension.

It is also directly contrary to the holding of the Circuit Court of Appeals (Seventh Circuit) in the case

of American Chain Company vs. Interstate Iron & Steel Company, 291 Fed. 1006, certiorari denied, 263 U. S. 709, in which it is stated:

> "If buyer had desired to condition its obligation upon the contingencies of war, it would have been easy to take up that question with seller."

In conclusion, we submit that this record presents a case of sufficient general importance, and containing sufficient apparent error, to justify its review by this Court by certiorari.

Respectfully submitted,

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